

2002

State of Utah v. Wade Willis : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

STATE OF UTAH,

Plaintiff/Appellee,

vs.

WADE WILLIS,

Defendant/Appellant.

Case No. 20020703-SC

BRIEF OF APPELLANT

APPEAL FROM THE UTAH COURT OF APPEALS, FROM AN
AFFIRMANCE OF A CONVICTION OF POSSESSION OF A FIREARM
BY A RESTRICTED PERSON, A SECOND DEGREE FELONY

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FILED
UTAH SUPREME COURT

MAY 13 2003

PAT BARTHOLOMEW
CLERK OF THE COURT

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IN THE UTAH SUPREME COURT

STATE OF UTAH,

Plaintiff/Appellee,

vs.

WADE WILLIS,

Defendant/Appellant.

Case No. 20020703-SC

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

Jurisdiction is conferred upon the Utah Supreme Court pursuant to the provisions of Utah Code Annotated § 78-2-2(3)(a).

ISSUES PRESENTED AND STANDARDS OF REVIEW

Whether Utah Code Annotated § 76-10-503(2)(a) is unconstitutional on its face because it prohibits mere possession of a firearm? Constitutional challenges to statutes are questions of law reviewed by this court for correctness. *State v. In*, 2000 UT App 358, ¶ 3, 18 P.3d 500. This issue was preserved in a motion to dismiss (R. 45-124, 191).

CONTROLLING STATUTORY PROVISIONS

Article I, § 6 of the Utah Constitution

The individual right of the people to keep and bear arms for security and defense of self, family, and others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.

Article I, § 26 of the Utah Constitution

The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.

Utah Code Annotated § 76-10-503(2)(a)

[a] Category I restricted person who purchases, transfers, possesses, uses or has under his custody or control: (a) any firearm is guilty of a second degree felony.

STATEMENT OF THE CASE

A. Nature of the Case

Wade Willis appeals from the judgment, sentence and commitment of the Honorable Gary D. Stott, Fourth District Court, after the entry of a conditional plea to the charge of possession of a firearm by a restricted person, a second degree felony,

and the Court of Appeals affirmation of his conviction. *State v. Willis*, 2002 UT App 229, 451 Utah Adv. Rep. 12, 52 P.3d 461.

B. Trial Court Proceedings and Disposition

Wade Willis was charged by information filed in Fourth District Court on August 15, 2000, with possession of a firearm by a restricted person, a second degree felony, in violation of Utah Code Annotated § 76-10-503(2)(a), and theft, a second degree felony, in violation of Utah Code Annotated §§ 76-6-404, 412 (R. 2).

On October 4, 2000, a preliminary hearing was held at which time Willis was bound over for trial on the charges upon a finding of probable cause; and pleas of “not guilty” were entered upon arraignment (R. 18, 191 at 26).

On October 11, 2000, Willis filed a Motion to Suppress Evidence on grounds that the probation search of his residence constituted an illegal warrantless search under the Fourth Amendment to the United States Constitution (R. 23-29). After a hearing on January 2, 2001, Judge Gary D. Stott denied the motion (R. 42-43, 192).

On January 4, 2001, Willis filed a Motion to Dismiss on grounds that Utah Code Annotated § 76-10-503(2)(a) is unconstitutional on its face and in violation of the right to keep and bear arms set forth in Article I, § 6 of the Utah Constitution (R. 45-124). On February 6, 2001, Judge Stott denied the motion (R. 142-43).

On March 23, 2001, Willis entered a plea of “guilty” to possession of a firearm by a restricted person, a second degree felony, conditioned upon his right to appeal the denial of his motion to suppress and motion to dismiss (R. 164-71, 172-74, 177).

On May 11, 2001, Willis was sentenced to 180-days in the Utah County Jail, ordered to pay a fine, and placed on supervised probation for a period of thirty-six months (R. 180-82).

On June 8, 2001, Willis filed a Notice of Appeal in Fourth District Court (R. 184). On July 5, 2002, the Court of Appeals affirmed Willis’ conviction. *State v. Willis*, 2002 UT App 229, 451 Utah Adv. Rep. 12, 52 P.3d 461.

On September 2, 2002, Willis filed a Petition for Writ of Certiorari to the Utah Court of Appeals that was granted by this Court.

STATEMENT OF RELEVANT FACTS

Jonathan Coones testified that he is the owner of a 9-milimeter handgun (R. 191 at 5). Coones testified that in August of 2000 the gun was kept on the top shelf of a closet in his motor home which was located in his backyard in Spanish Fork (R. 191 at 5, 7, 10). Coones testified that he knows Willis and that Willis was given permission to enter the motor home by Coones’ mother (R. 191 at 5-6). Sometime later, Coones discovered that his gun was missing (R. 191 at 6). Coones asked Willis about the gun but Willis denied taking it (R. 191 at 7). At the time, the gun turned up missing the

lock on the motor home door did not work and a few other people had access to the motor home (R. 191 at 8).

Eric Price, an employee of Adult Probation & Parole, testified that he is Willis' probation officer and that in August of 2000 Willis was on felony probation for evading a police officer, a third degree felony (R. 191 at 15). Price testified that he received a call from Detective Mitchell and was informed that Willis was a suspect of a theft of a firearm from Coones (R. 191 at 17-18). On August 1, 2000, Price--based on the information he received from Mitchell--searched Willis' home located at 1516 South 320 East in Orem; and was present when a 9-millimeter firearm was found in Willis' bedroom closet (R. 191 at 15-16, 18).

Brad Mitchell, a detective with the Spanish Fork Police Department, testified that he investigated a complaint from Coones concerning the missing handgun (R. 191 at 20-21). Mitchell contacted Adult Probation & Parole and directed them to Willis' home (R. 191 at 21). The serial number provided by Coones was the same serial number that was on the gun found at Willis' residence (R. 191 at 21). Mitchell later interviewed Willis and was told that "the handgun was given from Mr. Coones to his mother and that his mother had asked him to store the gun in his bedroom for his mother" (R. 191 at 22).

SUMMARY OF ARGUMENT

Willis asserts that the plain language of Article I, § 6, as it was amended in 1984, provides that an individual's right to keep and bear arms shall not be infringed, and that it grants to the legislature only the power to define the lawful use of arms. Accordingly, Willis asserts that Utah Code Annotated § 76-10-503(2)(a) is unconstitutional on its face because it infringes on the right of individuals--including Willis--to merely "possess" or have "under [their] custody or control" any firearm and subjects them to felony prosecution and possible incarceration.

ARGUMENT

I. THE COURT OF APPEALS' DECISION THAT UTAH CODE ANNOTATED §76-10-503(2)(a) DOES NOT VIOLATE THE PLAIN LANGUAGE OF ARTICLE I, §6 OF THE UTAH CONSTITUTION IS ERRONEOUS.

Willis asserts that the plain language of Utah Code Annotated § 76-10-503(2)(a) violates his individual right to bear and keep arms set forth in the plain language of Article I, § 6 of the Utah Constitution because it makes mere possession of a firearm by a restricted person a crime. Utah Code Annotated § 76-10-503(2)(a) essentially reads that any category I restricted person who "purchases, transfers, *possesses*, uses, or has under his custody or control: any firearm is guilty of a second degree felony" (emphasis added). The trial court denied Willis' motion on grounds that this Court in *State v. In*, 2000 UT App 358, 18 P.3d 500, had ruled that this statute "does not unconstitutionally interfere with one's right to bear arms" and that the statute "only

restricts [the right to bear arms] under very limited circumstances--such as a felony indictment or conviction” (R. 142) (quoting *In*, 2000 UT 358 at ¶14). The Court of Appeals affirmed the ruling of the trial court based on its prior decision in *In* and also because the court found no distinction between the terms “use” and “possess”.

Willis asserts that the Court of Appeals’ reliance on *State v. In* is erroneous. First, the Court of Appeals in *In* specifically did not address the issue of whether the statute as it relates to mere possession of a firearm is constitutional on its face. *In*, 2000 UT App 358 at ¶ 3, n.2. Similarly, the Court of Appeals in *State v. Archambeau*, 820 P.2d 920, 926 (Utah App. 1991), refused to reach the merits of a similar constitutional challenge as to possession of a weapon by a parolee because the issue was not raised in the trial court and did not rise to the level of plain error. Accordingly, contrary to the trial court’s ruling, neither this Court nor the Court of Appeals had ever addressed the issue of whether Utah Code Annotated § 76-10-503(2)(a) as it relates to mere possession of a firearm is unconstitutional on its face in regards to the current plain language of Article I, § 6 of the Utah Constitution.

Second, in *In*, the defendant actually used a firearm rather than merely possessing it. 2000 UT App 358 at ¶ 2. The legislature’s ability to regulate the *use* of arms is not impeded by the plain language of Article I, § 6. Accordingly, the Appeals’ Court statement in *In*, 2000 UT App 358 at ¶ 14, that Utah Code Annotated § 76-10-503(2)(a) “does not unconstitutionally interfere with one’s right to bear arms” because it “only restricts that right under very limited circumstances – such as felony or

indictment or conviction” is correct as it relates to use of a weapon by a restricted person – which is the factual scenario that was presented in *In. See also Willis*, 2002 UT App 229 at ¶ 3.

However, Willis asserts that the Court of Appeals’ distinction between the terms “use” and “possess” in the plain language of Utah Code Annotated § 76-10-503(2)(a) is erroneous. When examining statutory language, appellate courts are to “assume the legislature used each term advisedly and in accordance with its ordinary meaning.” *State v. Tooele County*, 2002 UT 8, ¶ 10, 44 P.3d 680 (citing *Nelson v. Salt Lake County*, 905 P.2d 872, 875 (Utah 1995)). Furthermore, appellate courts should “avoid interpretations that will render portions of a statute superfluous or inoperative.” *Hall v. State Dep’t of Corr.*, 2001 UT 34, ¶ 15, 24 P.3d 958. *See also State v. McKinnon*, 2002 UT App 214, 51 P.3d 729 n.4.

The legislature saw fit to include both “use” and “possess” in § 76-10-503(2)(a). The terms “use” and “possess” have different ordinary meanings. Accordingly, the Court of Appeals erred in finding no distinction between the terms. Moreover, in failing to define the terms according to their ordinary meaning, the Court of Appeals has effectively rendered the term “possess” superfluous and inoperative.

Third, pre-1984 case law is not on point and is not dispositive on this issue. Thus, the Court of Appeals’ reliance on pre-1984 case law such as *State v. Beorchia*, 530 P.2d 813 (Utah 1974), is misplaced.

Prior to January 1, 1985, Article I, § 6 of the Utah Constitution read: “The people have the right to bear arms for their security and defense, but the Legislature may regulate the exercise of this right by law.” *State v. Vlacil*, 645 P.2d 677, 680 (Utah 1982). Based upon this language this Court in *State v. Beorchia*, 530 P.2d 813, 814 (Utah 1974), held that a statute which made it a class A misdemeanor for non-citizens to possess any dangerous weapon did not violate Article I, § 6 because it “is quite evident from the language [of the amendment] that the Legislature had sufficient power to enact the statute in question.” This Court in *Beorchia* also held that the statute did not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution because “[t]he sale, use and possession of firearms are proper subjects of regulation by the State” and “[t]he Fourteenth Amendment is not generally applied so as to restrict exercise of the police powers of the State.”

A few years later this Court addressed the constitutionality of this same statute under the Second Amendment to the United States Constitution. *See State v. Vlacil*, 645 P.2d 677 (Utah 1982). This Court concluded “the right to bear arms under the federal constitution is collective rather than individual.” 645 P.2d at 679. Based upon this conclusion, this Court held that “an individual’s right to bear arms is subject to the police power of the various states.” 645 P.2d at 679. Accordingly, the statute that made it a crime for non-citizens to possess a dangerous weapon was not prohibited by the Second Amendment either.

After the decisions in *Beorchia* and *Vlacil*, the Utah Legislature changed the language of Article I, § 6 in order to secure greater individual rights. *See* M. Truman Hunt, *The Individual Right to Bear Arms: An Illusory Pacifier?*, 4 Utah L.Rev. 751, 751-755 (1986). This constitutional amendment was approved by the electorate in November of 1984, and took effect on January 1, 1985. Article I, § 6 of the Utah Constitution now reads:

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.

Willis asserts that this amendment clarifies that the right to bear and possess arms under the state constitution is an individual right rather than a collective one. Further, the language of this current constitutional provision was specifically designed to guarantee “broad individual liberties and protect[] the enjoyment of those liberties from infringement.” 4 Utah L.Rev. at 752 n.8, (*citing* Utah Voter Information Pamphlet, 28 (1984)).

In addition, whereas prior to the 1984 amendment, the Legislature had the ability to “regulate the exercise” of the right to bear arms by law, now the Legislature only has the ability to “defin[e] the lawful *use* of arms” (emphasis added). Therefore, Willis asserts that the plain language of Article I, § 6 of the Utah Constitution prevents the legislature from limiting or restricting an individual’s right to possess and keep

firearms. Moreover, “In considering the meaning of a constitutional provision, a court must begin its analysis with the plain language of the provision and need not look beyond the plain language unless some ambiguity is found.” *Utah School Boards Ass’n v. Utah State Bd. Of Education*, 2001 UT 2, ¶ 13, 17 P.3d 1125 (quoting *In re Worthen*, 926 P.2d 853, 866 (Utah 1996)).

Because the plain language of Article I, § 6 provides that an individual’s right to keep and bear arms shall not be infringed, and because the plain language also grants to the legislature only the power to define the lawful use of arms, Willis asserts that Utah Code Annotated § 76-10-503(2)(a) is unconstitutional on its face because it violates the plain language of Article I, § 6 of the Utah Constitution and infringes on the right of individuals—including Willis—to merely “possess” or have “under [their] custody or control” any firearm and subjects them to felony prosecution and possible incarceration. Moreover, Article I, § 26 of the Utah Constitution states, “The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.”

Furthermore, legislative history of Article I, §6 (1985) is not helpful. It appears that when the amendment process began, the legislators desired to insure a state individual right to keep and bear arms (Utah H., Debate on Sen. Jt. Res. No. 2, 1-3 on the Floor of the House, (Mar. 7, 1983)). The voter information pamphlet for November 6, 1984 indicates in the “Arguments For” section that “convicted felons, mental incompetents, minors, and illegal aliens would not be guaranteed” the right to

keep and bear arms. Voter Information Pamphlet page 28. In the “Rebuttal To” section, the author warns that the language of the amendment itself makes no mention of classes of people who are not protected by the amendment. *Id.* It also appears that the amendment was not studied by the Judiciary Interim Study Committee or by the Constitutional Study and Revision Commission. *Id.* at 4-5, 9-10; (minutes of the Constitutional Revision Committee, 5/25/84 page 2) (R. 118-24, 123).

Willis asserts that while this Court may deem the constitutional amendment of Article I, § 6 unwise, judicial compensation is not the answer. If the legislature wants to penalize offenders for possessing weapons, the legislature needs to propose an amendment to the constitution and submit it to the electorate.

If this Court were to save the statute penalizing mere possession of weapons by offenders by finding that, in defining lawful use of arms under Article I, § 6, the legislature may proscribe mere possession, the constitutional right to keep and bear arms would be an empty shell for all of us. Moreover, Willis asserts that Article I, § 26 of the Utah Constitution requires this Court to give effect to the plain language of Article I, § 6. Accordingly, Willis asks that this Court reverse the decision of the Utah Court of Appeals.

CONCLUSION AND PRECISE RELIEF SOUGHT

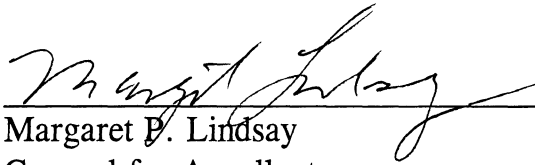
For the foregoing reasons, Willis asks this Court to reverse the Court of Appeals' decision on the ground that the statute which makes it unlawful for a restricted person to merely possess a firearm violates his individual right to keep arms as guaranteed by the Utah Constitution. Willis further asks that this matter be remanded to the Fourth District with instructions that his plea is to be withdrawn, and the matter dismissed.

RESPECTFULLY SUBMITTED this 14th day of May, 2003.


Margaret P. Lindsay
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I delivered four (4) true and correct copies of the foregoing Brief of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 14th day of May, 2003.


Margaret P. Lindsay
Counsel for Appellant

ADDENDA

(3) A muzzle loading firearm shall be deemed to be loaded when it is capped or primed and has a powder charge and ball or shot in the barrel or cylinders. 1990

76-10-503. Restrictions on possession, purchase, transfer, and ownership of dangerous weapons by certain persons.

(1) For purposes of this section:

- (a) A Category I restricted person is a person who:
- (i) has been convicted of any violent felony as defined in Section 76-3-203.5;
 - (ii) is on probation or parole for any felony;
 - (iii) is on parole from a secure facility as defined in Section 62A-7-101; or
 - (iv) within the last ten years has been adjudicated delinquent for an offense which if committed by an adult would have been a violent felony as defined in Section 76-3-203.5.

(b) A Category II restricted person is a person who:

- (i) has been convicted of or is under indictment for any felony;

- (ii) within the last seven years has been adjudicated delinquent for an offense which if committed by an adult would have been a felony;

- (iii) is an unlawful user of a controlled substance as defined in Section 58-37-2;

- (iv) is in possession of a dangerous weapon and is knowingly and intentionally in unlawful possession of a Schedule I controlled substance as defined in Section 58-37-2;

- (v) has been found not guilty by reason of insanity for a felony offense;

- (vi) has been found mentally incompetent to stand trial for a felony offense;

- (vii) has been adjudicated as mentally defective as provided in the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993), or has been committed to a mental institution;

- (viii) is an alien who is illegally or unlawfully in the United States;

- (ix) has been dishonorably discharged from the armed forces; or

- (x) has renounced his citizenship after having been a citizen of the United States.

(2) A Category I restricted person who purchases, transfers, possesses, uses, or has under his custody or control:

- (a) any firearm is guilty of a second degree felony; or

- (b) any dangerous weapon other than a firearm is guilty of a third degree felony.

(3) A Category II restricted person who purchases, transfers, possesses, uses, or has under his custody or control:

- (a) any firearm is guilty of a third degree felony; or

- (b) any dangerous weapon other than a firearm is guilty of a class A misdemeanor.

(4) A person may be subject to the restrictions of both categories at the same time.

(5) If a higher penalty than is prescribed in this section is provided in another section for one who purchases, transfers, possesses, uses, or has under this custody or control any dangerous weapon, the penalties of that section control. 2000

6-10-504. Carrying concealed dangerous weapon — Penalties.

(1) Except as provided in Section 76-10-503 and in Subsections (2) and (3):

- (a) a person who carries a concealed dangerous weapon, as defined in Section 76-10-501, which is not a firearm on his person or one that is readily accessible for immediate use which is not securely encased, as defined in this part, in a place other than his residence, property,

or business under his control is guilty of a class B misdemeanor; and

- (b) a person without a valid concealed firearm permit who carries a concealed dangerous weapon which is a firearm and that contains no ammunition is guilty of a class B misdemeanor, but if the firearm contains ammunition the person is guilty of a class A misdemeanor.

(2) A person who carries concealed a sawed-off shotgun or a sawed-off rifle is guilty of a second degree felony.

(3) If the concealed firearm is used in the commission of a violent felony as defined in Section 76-3-203.5, and the person is a party to the offense, the person is guilty of a second degree felony.

(4) Nothing in Subsection (1) shall prohibit a person engaged in the lawful taking of protected or unprotected wildlife as defined in Title 23, Wildlife Resources Code, from carrying a concealed weapon or a concealed firearm with a barrel length of four inches or greater as long as the taking of wildlife does not occur:

- (a) within the limits of a municipality in violation of that municipality's ordinances; or

- (b) upon the highways of the state as defined in Section 41-6-1. 2000

76-10-505. Carrying loaded firearm in vehicle, on street, or in prohibited area.

(1) Unless otherwise authorized by law, a person may not carry a loaded firearm:

- (a) in or on a vehicle;

- (b) on any public street; or

- (c) in a posted prohibited area.

(2) A violation of this section is a class B misdemeanor. 1990

76-10-505.5. Possession of a dangerous weapon, firearm, or sawed-off shotgun on or about school premises — Penalties.

(1) A person may not possess any dangerous weapon, firearm, or sawed-off shotgun, as those terms are defined in Section 76-10-501, at a place that the person knows, or has reasonable cause to believe, is on or about school premises.

(2) (a) Possession of a dangerous weapon on or about school premises is a class B misdemeanor.

(b) Possession of a firearm or sawed-off shotgun on or about school premises is a class A misdemeanor.

(3) This section applies to any person, except persons authorized to possess a firearm as provided under Sections 53-5-704, 53-5-705, 53A-3-502, 76-10-511, 76-10-523, Subsection 76-10-504(2), and as otherwise authorized by law.

(4) This section does not prohibit prosecution of a more serious weapons offense that may occur on or about school premises. 1997

76-10-506. Threatening with or using dangerous weapon in fight or quarrel.

Every person, except those persons described in Section 76-10-503, who, not in necessary self defense in the presence of two or more persons, draws or exhibits any dangerous weapon in an angry and threatening manner or unlawfully uses the same in any fight or quarrel is guilty of a class A misdemeanor. 1992

76-10-507. Possession of deadly weapon with intent to assault.

Every person having upon his person any dangerous weapon with intent to unlawfully assault another is guilty of a class A misdemeanor. 1973

76-10-508. Discharge of firearm from a vehicle, near a highway, or in direction of any person, building, or vehicle — Penalties.

(1) (a) A person may not discharge any kind of dangerous weapon or firearm:

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JAN 4 6:05 PM '01

IN THE FOURTH JUDICIAL DISTRICT COURT, PROVO DEPARTMENT, IN
AND FOR THE COUNTY OF UTAH, STATE OF UTAH

THE STATE OF UTAH,	:	MOTION TO DISMISS
Plaintiff,	:	
vs.	:	
	:	
WADE LEON WILLIS,	:	Case No. 001403071
	:	JUDGE STOTT
Defendant.	:	

ARGUMENT

I. THE STATUTE PROHIBITING PEOPLE ON PROBATION OR PAROLE FOR ANY FELONY FROM POSSESSING A DANGEROUS WEAPON VIOLATES THE STATE CONSTITUTIONAL RIGHT TO KEEP AND BEAR ARMS

Possession of weapons for any lawful purpose is protected by the 1985 revision of Article

I Section 6 of the Utah Constitution which reads:

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.

The statute with which Mr. Willis is charged §76-10-503(2)(a) purports to penalize mere possession of weapons without any regard to the use or purpose of the weapon. It reads:

- (2) Any Category I restricted person who purchases, transfers, possesses, uses, or has under his custody or control:
 - (a) any firearm is guilty of a second degree felony

This issue was argued but not decided in State v. Archambeau, 820 P.2d 920, (Utah App. 1991). (attached) The court, at 926, declined to reach the merits of a similar constitutional challenge as to parolees because the issue was not raised in the trial court. The appellate court held that failure of the trial court to have recognized the unconstitutionality of the statute was not plain error. The Court of Appeals found no plain error holding that the new amendment to Article I, §6 of the Utah Constitution did not obviously invalidate prior Utah authority approving restrictions of weapon possession.

Although the Archambeau court was correct that such statutes had previously been approved, it incorrectly discounted the Legislative history of this amendment which is attached hereto and incorporated by reference.¹ The debate regarding the amendment indicates that the amendment was

¹ Reference to the legislative history (in Appendix 1) is not dispositive. It appears that when the amendment process began, the legislators desired to insure a state individual right to keep and bear arms (House floor debates on Senate Joint Resolution No. 2, 3/7/83 pages 1-3).

It appears that the amendment was not studied by the Judiciary Interim Study Committee or by the Constitutional Study and Revision Commission (House floor debates on Senate Joint Resolution No. 2, 3/7/83 pages 4-5, 9-10; minutes of the Constitutional Revision Committee, 5/25/84 page 2).

The voter information pamphlet for November 6, 1984 indicates in the “Arguments For” section that “convicted felons, mental incompetents, minors, and illegal aliens would not be guaranteed” the right to keep and bear arms. Pamphlet page 28. In the “Rebuttal To” section, the author warns that the language of the amendment itself makes no mention of classes of people who are not protected by the amendment. Id.

Additional history of the amendment is found in “The Individual Right to Bear Arms: An Illusory Public Pacifier?”, 1986 Utah L.Rev. 751, 751-755 and accompanying notes.

passed in an effect to “overrule” and nullify the Utah Supreme Court’s decision in State v. Vlacil, 645 P.2 697, (Utah 1982) which held that the right to bear arms was a collective rather than an individual right and that the Legislature could regulate possession of weapons.

II THE COURT SHOULD RELY ON THE PLAIN LANGUAGE OF THE UTAH CONSTITUTION IN STRIKING THIS STATUTE DOWN AS UNCONSTITUTIONAL.

While the Utah Constitution allows for legislation defining the lawful use of weapons, it flatly prohibits legislation infringing on the individual right to keep and bear arms for any lawful purpose. It states:

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.

Constitution of Utah, Article I section 6 (1985 version in 1990 supp.).

This Court must strike the statute purporting to penalize mere possession of dangerous weapons because it infringes the individual right to keep and bear arms and does not define a lawful (or unlawful) use of arms.

Reference to basic tenets of federalism and Utah constitutional construction, establish that this argument is properly raised for this Court’s adjudication.

A. PRINCIPLES OF FEDERALISM CALL FOR A RULING UNDER THE STATE CONSTITUTION

As is discussed more fully below, basic tenets of federalism call for this Court to enforce the Utah Constitution in answering this question of state law.

The United States of America is a federation of state governments. The states preceded the federation and hold general, residual powers to govern, which are limited only by the state and

federal constitutions. In contrast, the federal government's powers are limited to those enumerated in the federal constitution. See e.g. Constitution of Utah States, Amendment X. This federalist form of government is based on historical distrust, fear and confinement of centralized government, and historical trust and empowerment of local government to represent and serve the citizens of each state. See e.g. Manning v. Sevier County, 517 P.2d 549, 553-554 (Utah 1973) (Crockett, J. concurring, joined by Ellett J., Henriod, J.).

Federalist reliance on local government and limitation of centralized government is reflected in the differences between state and federal constitutions. State constitutions are tailored to the regions they govern, they are detailed and specific, they are dynamic. On the other hand, the federal constitution is uniform, general, and unchanging. Compare the frequently amended Utah Constitution with the federal constitution. See also Utah Code Ann. Section 63-54-1 et seq. (Utah Constitution Revision Study Commission created to study Utah Constitution, inform governor and legislature of needed changes).

Federalism is a principle that is important in Utah. The people of this state historically have cherished local government and fought to limit federal intrusion into questions of state law. E.g. L.J. Arrington and D. Bitton, The Mormon Experience, 161-184. Our state Supreme Court was perhaps the last state court to accept "incorporation" of provisions of the federal Bill of Rights. See e.g. Manning v. Sevier County, 517 P.2d 549, 553 (Utah 1973) (Crockett, J. concurring, joined by Ellett, J., Henriod, J.) (federal incorporation doctrine is disingenuous, violative of principles of federalism, first amendment to United States Constitution does not apply to state actors).

The question raised in this case, whether individual citizens should be allowed to possess weapons, is a question of state law. While the federal constitution does have a provision referring to a right to bear arms, that provision applies exclusively to federal government – not state

government. E.g. State v. Vlacil, 645 P.2d 677, 679 (Utah 1982). The federal provision refers to a collective right, which does not protect individuals. Id. The federal provision is interpreted narrowly as facilitating militias. Id.

Utah, like many other states, has a state constitutional provision protecting the individual right to keep and bear arms. Constitution of Utah, Article I section 6 (1985, in 1990 Supp.).² The language of the current constitutional provision relating to the individual right to keep and bear arms was passed by a strong majority of the Utah legislature after years of negotiation and revision. “The Individual Right to Bear Arms: An Illusory Public Pacifier?”, 1986 Utah L.Rev. 751, 753-754 nn.13. (attached) The language of the current constitutional provision relating to the individual right to keep and bear arms was passed by a strong majority of the Utah voters. Id. At n.12.

Basic principles of federalism call on this Court to recognize and follow this constitutional provision in deciding this case.

B. PRINCIPLES OF UTAH CONSTITUTIONAL CONSTRUCTION CALL FOR A RULING UNDER THE PLAIN LANGUAGE OF THE STATE CONSTITUTION.

Mr. Willis’ argument that the statute penalizing the mere possession of weapons violates the plain language of the Utah Constitution comports with the Utah Constitutional rule that the Utah Constitution is to be applied in accordance with its express terms. Article I section 26 of the Utah Constitution provides:

The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.

Article I section 26 (1953).

² Reference to other state constitutional provisions and decisions is not helpful; Utah’s provision is unique and apparently the broadest in the nation. See Appendix 2 (containing provisions from other state constitutions).

The argument that the plain language of the Utah Constitution should be given effect is also consistent with the doctrine of separation of powers, which is explicitly recognized in the Utah Constitution. Constitution of Utah, Article V section 1 (1953). Sutherland explains how judicial allegiance to the plain language enacted by the legislature is required by the doctrine of separation of powers:

The preference for literalism in determining the effect of a statute is based on the constitutional doctrine of separation of powers. The courts owe fidelity to the will of the legislature. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature. The Rhode Island Supreme Court has captured this idea in the following language: “It is an elementary proposition that courts only determine by construction the scope and intent of the law when the law itself is ambiguous or doubtful. If a law is plain and within the legislative power, it declares itself and nothing is left for interpretation. It is as binding upon the court as upon every citizen. To allow a court, in such a case, to say that the law must mean something different from the common import of its language, because the court may think that its penalties are unwise or harsh would make the judicial superior to the legislative branch of the government, and practically invest it with the lawmaking power. The remedy for a harsh law is not in interpretation but in amendment or repeal.”

Sutherland, Statutory Construction, §46.03

While this Court may deem the constitutional amendment of Article I section 6 unwise, or even dangerous, judicial compensation is not the answer. If the legislature wants to penalize offenders for possessing weapons, the legislature needs to propose an amendment to the constitution and submit it to the electorate.

If this Court were to save the statute penalizing mere possession of weapons by offenders by finding that, in defining lawful use of arms under Article I section 6, the legislature may proscribe mere possession, the constitutional right to keep and bear arms would be an empty shell for all of


us. Article I section 26 of the Utah Constitution (requiring literal interpretation of Utah Constitution) and Article V section 1 of the Utah Constitution (requiring separation of judicial, legislative, and executive powers) require this Court to give effect to the plain language of Article I section 6 (1985).

CONCLUSION

Based on the above argument and authorities Mr. Willis respectfully requests this Court to dismiss Count I, unlawful possession of a dangerous weapon by a restricted person, on the ground that the statute violates his individual right to bear arms as guaranteed by the Utah Constitution.

DATED this 3 day of October, 2000.

RESPECTFULLY SUBMITTED,



JARED W. ELDRIDGE
Attorney for Defendant

MAILED/DELIVERED a copy of the foregoing to the office of the Utah County Attorney's Office, 150 East Center, Provo, Utah 84601, this _____ day of January, 2001.

2-6-01 Deputy

**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

STATE OF UTAH, Plaintiff, vs. WADE LEON WILLIS, Defendant.	RULING AND ORDER Case No. 001403071 Judge Gary D. Stott
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Before the Court is Defendant's Motion to Dismiss, filed January 4, 2001, and his accompanying memorandum in support thereof. The State filed an Opposition to Defendant's Motion to Dismiss, and the Defendant filed a Response.

Defendant moves to dismiss Count I of this prosecution on the grounds that U.C.A. § 76-10-503(2)(a) violates Defendant's right to keep and bear arms pursuant to Article I, Section 6 of the Utah Constitution. This provision of the Utah Constitution reads:

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.

The Defendant argues that a portion of the statute under which Defendant was charged is at odds with this provision of the Utah Constitution, and is therefore unconstitutional. Defendant was charged under U.C.A. § 76-10-503(2)(a), which reads:

- (2) Any Category I restricted person who purchases, transfers, possesses, uses, or has under his custody or control:
- (a) any firearm is guilty of a second degree felony.

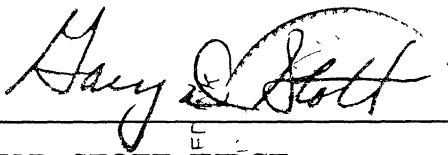
Defendant maintains that the Utah Constitution has granted the legislature the power to regulate the *use* of firearms, but not the *possession* of firearms. Defendant asserts that this statute is unconstitutional because it prohibits the mere possession of a firearm, the crime with which Defendant was charged in Count I.

The recent case of State v. In, 2000 UT App. 358, addresses the constitutionality of U.C.A. § 76-10-503(2)(a) in light of Article I, Section 6 of the Utah Constitution. The Appellate Court noted that “[w]hen addressing [constitutional challenges], this court presumes that the statute is valid, and [resolves] any reasonable doubts in favor of constitutionality.” Id. The court then concluded that the statute “does not unconstitutionally interfere with one’s right to bear arms. This statute only restricts that right under very limited circumstances—such as a felony indictment or conviction. Such restrictions are constitutional.” Id. (citations omitted). The court further cited State v. Beorchia, 530 P.2d 813, 815 (Utah 1974), as holding that this statute is a proper exercise of State police powers.

In light of this recent appellate decision, the Court holds that the restrictions contained in U.C.A. § 76-10-503(2)(a), including the restriction of mere possession of a firearm by a restricted person, do not unconstitutionally interfere with one’s right to bear arms because the statute only restricts that right under very limited circumstances. Defendant’s Motion is Dismiss is therefore denied.

DATED this 6 day of Feb, 2001,

BY THE COURT



GARY D. STOTT, JUDGE

ORIGINAL FILED
STATE OF UTAH
CLERK OF COURT
JAN 11 2001
SALT LAKE CITY

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 001403071 by the method and on the date specified.

METHOD NAME

By Hand STATE OF UTAH
By Hand JARED ELDRIDGE

Dated this 6 day of Feb, 2001.

Keri Synt
Deputy Court Clerk

State v. Willis, 2002 UT App 229, 52 P.3d 461
451 Utah Adv. Rep. 12,
(Cite as: 52 P.3d 461)



Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Wade WILLIS, Defendant and
Appellant.

No. 20010495-CA.

July 5, 2002.

Defendant was convicted in Fourth District Court, Provo Department, Gary D. Stott, J., of possession of a firearm by a restricted person. Defendant appealed. The Court of Appeals, Jackson, P.J., held that Weapons Restriction Statute was not unconstitutional.

Affirmed.

West Headnotes

[1] Criminal Law ⚔️1134(3)
110k1134(3) Most Cited Cases

A constitutional challenge to a statute presents a question of law, which is reviewed for correctness.

[2] Constitutional Law ⚔️48(1)
92k48(1) Most Cited Cases

[2] Constitutional Law ⚔️48(3)
92k48(3) Most Cited Cases

When addressing a constitutional challenge to a statute, the reviewing court presumes that the statute is valid, and resolves any reasonable doubts in favor of constitutionality.

[3] Weapons ⚔️1
406k1 Most Cited Cases

[3] Weapons ⚔️4
406k4 Most Cited Cases

Weapons Restrictions Statute that prohibited defendant from possessing a firearm was a valid exercise of State police power and did not violate Second Amendment, where statute restricted the right under very limited circumstances such as felony indictment or conviction. U.S.C.A. Const. Amend. 2; Const. Art., 1, § 6; U.C.A. 1953, 76-10-503(2)(a).

*461 Margaret P. Lindsay, Provo, for Appellant.

Mark L. Shurtleff and Brett J. DelPorto, Salt Lake City, for Appellee.

Before Judges JACKSON, DAVIS, and THORNE.

OPINION

JACKSON, Presiding Judge:

¶ 1 Defendant appeals his conviction subsequent to a conditional guilty plea to possession of a firearm by a restricted person, a second-degree felony, in violation of Utah Code Ann. § 76-10-503(2)(a) (Supp.2001) (Weapons Restrictions Statute). [FN1] We affirm.

FN1. This section provides, in pertinent part, "[a] Category I restricted person who purchases, transfers, possesses, uses, or has under his custody or control: (a) any firearm is guilty of a second degree felony." Utah Code Ann. § 76-10-503(2)(a) (Supp.2001).

[1][2] ¶ 2 Defendant challenges the statute under which he was convicted as being unconstitutional on its face. " 'A constitutional challenge to a statute presents a question of law, which we review for correctness.... When addressing such a challenge, *462 this court presumes that the statute is valid, and we resolve any reasonable doubts in favor of constitutionality.' " State v. Morrison, 2001 UT 73, ¶ 5, 31 P.3d 547 (Utah 2001) (alteration in original) (quoting State v. Lopes, 1999 UT 24, ¶ 6, 980 P.2d 191).

ANALYSIS

[3] ¶ 3 State v. In, 2000 UT App 358, 18 P.3d 500, is controlling. In that case we

stated that the Weapons Restrictions Statute

does not unconstitutionally interfere with one's right to bear arms. This statute only restricts that right under very limited circumstances--such as a felony indictment or conviction. Such restrictions are constitutional. See Utah Const. art. I, § 6 ...; [FN2] State v. Beorchia, 530 P.2d 813, 815 (Utah 1974) (holding that this section is a proper exercise of State police powers).

FN2. Utah Const. art. I, § 6 provides: "The individual right of the people to keep and bear arms for security and defense of self, family, and others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms."

Id. at ¶ 14. Defendant attempts to distinguish the present case by arguing that In only addresses the constitutionality of the statute as it applies to *use*, as opposed to "mere *possession* of a firearm by a restricted person." (Emphasis added.) However, our conclusion in In, a case in which the defendant was convicted of illegally *possessing* a firearm, simply stated that the restrictions contained in "this statute do[] not unconstitutionally interfere with one's right to bear arms," and made no distinction between use and possession. Id. Because In made no distinction between use and possession, its

conclusion that the Weapons Restrictions Statute is constitutional applies both to restrictions on possession and to restrictions on use. [FN3]

FN3. Moreover, we note that one may "use" a firearm by the mere act of possessing it--e.g., to deter unlawful behavior in "defense of self, family, and others" etc. Utah Const. art. I, § 6. By way of further illustration, we note that the United States, by mere possession of a nuclear arsenal, theoretically "uses" that arsenal to deter would-be aggressors from taking military action against it. We also note that Utah Const. art. I, § 6 makes no distinction between passive use and active use of a firearm.

¶ 4 Accordingly, we reject Defendant's constitutional challenge to the Weapons Restrictions Statute and affirm his conviction for possession of a firearm by a restricted person.

¶ 5 Affirmed.

¶ 6 We Concur: JAMES Z. DAVIS and WILLIAM A. THORNE JR., Judges.

52 P.3d 461, 451 Utah Adv. Rep. 12, 2002
UT App 229

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